

STATEMENT ON PROPOSED REVISION  
OF EXECUTIVE ORDER 12065 BEFORE THE  
SUBCOMMITTEE ON LEGISLATION AND  
THE RIGHTS OF AMERICANS

I would like to thank the Committee for this opportunity to address the proposed revision of Executive Order 12065. As you know, this Executive Order establishes a comprehensive scheme for the classification, declassification and protection of national security information. In so doing, the Order attempts to strike an appropriate balance between the need of the public to be informed about the activities of its Government and the need for certain information which is essential to our national defense and security to be protected from disclosure. The draft Order presently under consideration by the Committee achieves both of these objectives. It enhances the protection presently afforded national security information by existing Executive Order 12065, while continuing to ensure necessary public access to this information. The proposed Order also eliminates many of the unnecessary and burdensome requirements of Executive Order 12065, while providing individual agencies with greater flexibility to adopt procedures tailored to their particular functions and needs. In short, I believe this proposed revision is a significant improvement over the existing Order on classification.

The Agency is particularly supportive of the draft revisions which eliminate the balancing provision of Section 3-303 of the present Order, expand the presumption of harm in Section 1.3(c) to include intelligence sources or methods, reduce the presently

unrealistic requirements concerning systematic declassification mandated by Section 3-4 of Executive Order 12065, and change the overall tone of the Order to more appropriately reflect the Order's purpose of protecting national security information.

This change in tone is evidenced in the preamble of the Order, which establishes a more evenhanded approach in addressing the Order's twin goals of ensuring necessary public access to national security information and suitably protecting and safeguarding this same information. This revised tone is also reflected in a number of other provisions, which restate the present negative or limiting authorizations provided by Executive Order 12065 in a more positive manner.

With respect to the presumption of harm, Executive Order 12065 presently provides that the unauthorized disclosure of certain particularly sensitive information is "presumed to cause damage to the national security," and thus significantly reduces the burden of agencies in defending classification decisions in court. It should be emphasized that this presumption does not remove the need for agencies to satisfy themselves or the courts that such information is properly classified, it simply lessens the quantum of proof that must be provided in a public forum in support of the classification determination. This presumption is limited in present Executive Order 12065 to "foreign government information" and "confidential foreign sources." The proposed revision adds "intelligence sources or methods" as a category of information subject to this presumption. The Agency has requested that this

presumption be slightly expanded to include "intelligence sources or methods information" rather than simply "intelligence sources or methods." The addition of the word "information" is essential in our opinion to ensure that the presumption is not limited to the names or personal identifiers of intelligence sources, but applies to that information which could reasonably lead to or significantly facilitate the identification of an intelligence source. The Agency has also requested that "cryptologic information" be included within the presumption. As with intelligence sources or methods, cryptologic information is afforded special protection by statute and is the type of particularly sensitive information whose compromise should be subject to the additional protection provided by Section 1.3(c)'s presumption.

The proposed Order also deletes the balancing test set forth at Section 3-303 of present Executive Order 12065. This provision directs agencies receiving FOIA or declassification requests to undertake a balancing test in certain cases to determine whether the "need to protect classified information may be outweighed by the public interest in disclosure of the information." and in such cases where the public interest is found to be weightier, agencies are directed to release such information under the FOIA or to declassify it. This provision was simply intended to authorize agencies, in their sole discretion, to declassify otherwise properly classified information in certain limited special circumstances, such as where nondisclosure would place an individual's life in danger or impede legitimate law

enforcement functions. Despite Executive Branch disavowals of any intent to alter the substantive requirements of classification through the provision of this balancing test in Section 3-303, FOIA requesters have increasingly asserted a mandatory right to judicial review of agency classification decisions under this provision. The deletion of the balancing provision will not eliminate the ability of agencies to declassify otherwise properly classified information in certain special cases, but this decision to declassify will be, as it should be, a matter for the agency's sole judgment.

The Agency also supports the reduced requirements imposed upon agencies with respect to the systematic declassification of national security information. Executive Order 12065 requires time-consuming and costly page-by-page review of information which frequently is of no interest to the public and which is never likely to be the subject of an EOTA or mandatory review request. A recent General Accounting Office (GAO) Report recommended that Executive Order 12065 be revised to limit systematic review to only those records requested by the public. The systematic declassification scheme suggested in this GAO study has been implemented in large part in the proposed revision. Instead of requiring the review of all <sup>permanently</sup> classified <sup>VALUABLE</sup> information to comply with arbitrary 20- and 30-year time periods, a systematic review for declassification will be conducted only of those <sup>PERMANENTLY VALUABLE</sup> records accessioned into, or in the case of certain Presidential papers, already in the possession and

control of the National Archives. The time periods for such review will be established in procedures prescribed by ISOO and affected agencies, and will more accurately focus limited Agency resources on those records which are likely to be of continuing historical or other value. The draft Order also authorizes agencies to conduct their own internal systematic review programs to identify those additional record systems or information which may benefit from periodic review prior to these established time periods. Additionally, a <sup>(INCORRECT)</sup> systematic review for declassification will be available whenever a member of the public requests information under the FOIA, the Privacy Act or the mandatory review procedures of Section 3.4. This right to seek a declassification review will commence immediately after the information's creation and subsequent classification. Thus, those records which are of particular interest to historical researchers or other members of the public will be systematically reviewed in a timely and responsive manner, while avoiding the costly and unnecessary burden of reviewing all classified information within the above 20- or 30-year timeframes.

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the Agency's Director of Information Services, is here with me to provide additional information and answer any questions you may have with respect to the Agency's systematic declassification program.

26 Feb 82

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Comments on

Statement

I see only ~~three~~ errors:

Pg 4 he should have said  
"Permanent" records not "all  
classified information"

Pg 5 he uses "systematic" review  
when he should use "mandatory  
review."

~~Substantive comments~~

Pg 4 he refers to systematic  
review as requiring "page-by-page  
review and it should read  
"item-by-item".

Substantively I see nothing wrong  
with it. The suggestion of using  
"intel sources and methods information"  
(pg 3) is a little mystifying but  
I believe that section of the  
New E.O. (1.3c) is poorly  
written in any case. Its meaning  
is not clear to me (see attached).

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